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Supreme Court of the United States

OCTOBER TERM, 1958

No. 878

MICHAEL BERMAN, successor to LEWIS H. SAFER, as Trustee in Bankruptcy of the Estate of Riverside Iron and Steel Corporation, Bankrupt,

Plaintiff-Petitioner,

—against—

HEWITT S. WEST, JR., and THE FIRST NATIONAL BANK OF NEVADA, Reno, Nevada, Las Vegas Branch, as Executors of the Estate of Hewitt S. West, Deceased, and W. LUNSFORD LONG,

Defendants-Respondents.

BRIEF OPPOSING CERTIORARI

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Defendants-Respondents.

BRIEF OPPOSING CERTIORARI

Statement

Petitioner's application for a writ of certiorari is the last step in an extended litigation, commenced October 25, 1946, when action was first brought in the California state court to determine the respective rights of the parties under a letter agreement, dated March 14, 1941 (A. 16-21),* made between Riverside and Bradt, its president, on the one hand, and West and Long on the other (Pet. Appdx. A, pp. 32-33). This agreement related to the exploitation of an iron

* References are to pages of petitioner's Appendix in the Court of Appeals.

mining property in the State of California, called the Iron Chief, subsequently purchased and developed by Henry J. Kaiser.

Throughout twelve years of extensive litigation, the petitioner, or his predecessors in interest, the trustee, Saper, and Riverside Iron & Steel Corporation, and its president, Harlan H. Bradt, have been defeated uniformly *on the facts.*

District Judge Herlands in a carefully prepared opinion of 228 pages (A. 36-265) found below that each of the claims alleged in the seven counts of petitioner's complaint was not established *by the facts,* contrary to petitioner's contentions. He was unanimously affirmed by the Court of Appeals, Second Circuit, which in its opinion (See Pet. Appdx. A, pp. 29-40, *Saper* v. *West,* 263 F. 2d 442 (2 Cir. 1959), Advance Sheets No. 3, April 6, 1959) found that Judge Herlands had correctly determined that petitioner had failed to establish facts sufficient to support any of the claims asserted. The Court of Appeals also denied petitioner's petition for a rehearing (Pet. p. 2).

It would be difficult to present to this Court for review a case more thoroughly litigated and decided below on the facts. And we respectfully submit that the petition for certiorari should be denied since the case obviously presents no question meriting review.

The Facts

Petitioner, the Trustee in Bankruptcy of Riverside Iron & Steel Corporation, a Nevada corporation, seeks to recover herein, pursuant to *Section 60* [11 U. S. C. §96], *Section 67(d)(2)* [11 U. S. C. §1[illegible]d)] and

Section 70(e) [11 U. S. C. §110(e)] of the Bankruptcy Act. Recovery is sought of $76,898.48 from West and $81,898.48 from Long, the amounts awarded and paid to respondents under the letter agreement of March 14, 1941 (*supra*, p. 1) pursuant to a judgment of the California Superior Court, Los Angeles County, which fixed respondents' respective rights and interests under that agreement.

That judgment was entered on July 28, 1948 (A. 71-72), in an interpleader action, wherein the alleged bankrupt, Riverside, and the respondents, were opposing parties.

The California action was an interpleader action commenced to fix the rights of the respective parties in and to the proceeds of the sale of the Iron Chief mine to Kaiser, brought by one E. T. Foley, against Riverside and Bradt, its president, and the present respondents, West and Long, among others.

In that action the California trial court held by its judgment of July 28, 1948 (A. 37, 70-71), as slightly modified on September 24, 1948 (A. 72), that West and Long were entitled to receive $76,898.48 and $81,898.48, respectively, out of the proceeds of said sale by Foley to Kaiser.

The judgment directed Foley to deposit said sums with the Clerk of the court, to be paid by the Clerk to West and Long "forthwith and without further order of this Court", when "this judgment shall have become final in the court in which this proceeding shall be finally decided" (A. 71-72).

Foley deposited the funds with the Clerk, as directed by the California judgment, *on August 2, 1948* (A. 72). The stenographic record on that California trial consisted of more than 2800 pages of evidence (A. 192, fn. 81)* and many documentary exhibits, all of which testimony and exhibits were introduced into evidence upon the trial of the present action.

After appeals by Riverside and Bradt to the highest California court, the judgment of the California trial court was in all respects affirmed on November 16, 1950 (A. 79, 81). Upon remittitur, the Clerk of the Superior Court, Los Angeles County, on November 21, 1950, without further order, distributed to counsel for West and Long the sums of $76,898.48 and $81,898.48, respectively, awarded to them by the judgment of July 28, 1948 (A. 81) and as directed in that judgment (A. 71-72).

On March 14, 1951, just six days short of *four months* after the aforesaid funds had been distributed to West and Long, Bradt filed a *voluntary* petition in bankruptcy for Riverside, not in California nor in Nevada, the home state, but in the United States District Court for the Southern District of New York. On the same day, Riverside was adjudicated bankrupt (A. 81, fnd. 79).

Bradt's obvious purpose, which the Court of Appeals characterized as a "devious maneuver" (Pet. Appdx. A, p. 35) was to undo, if possible, the award made to West and Long by the judgment of the Cali-

* Footnotes to the District Court's opinion are designated "fn.", with the appropriate numbers. Findings by the District Court are designated "fnd." or "fnds.", with the appropriate number or numbers.

fornia court: because Bradt listed himself and members of his family as large creditors of Riverside and he included, also, as creditors, his friends, associates and attorneys (A. 260-264, Appdx. A, District Court Opinion). Bradt obviously thought that, through bankruptcy, he might retrieve from West and Long, for himself and associates, at least a substantial portion of the amounts awarded to West and Long under the 1948 judgment of the California court.

It is the above sums, paid to respondents pursuant to the California judgment, that the petitioner, as alleged trustee in bankruptcy of the alleged bankrupt, Riverside, seeks to recover in this action, upon the ground that such payments, directed by the 1948 judgment of the California court, constitute fraudulent transfers or preferential payments.

POINT I

The petition ignores all facts found by the District Court and affirmed by the Court of Appeals, Second Circuit—and, in particular, it ignores petitioner's failure to establish the existence of unsatisfied general creditors.

The petition for certiorari completely ignores all the pertinent facts of this case, as found and established by the 228 page opinion of the District Court, affirmed on all points by the Court of Appeals, Second Circuit.

To illustrate: Petitioner's entire case (Pet. p. 2) is built upon the assumption that West and Long were paid two-thirds of the proceeds of the sale of Riverside's only asset, the Iron Chief mine, "while the

general creditors of the corporation are unpaid." But that contention ignores the fact that the District Court found, as a fact, and was affirmed by the Court of Appeals, Second Circuit, that (A. 98):

> "135. It has not been established that Riverside incurred any debts in connection with the exploitation of the Iron Chief lease and sale agreement in excess of the amounts found and allowed to it in the California action. (See Defs. Exh. B-12, pp. 2903-04, 2906)."

And further (A. 99):

> "138. It has not been established that Riverside, in fact, incurred any debts or other obligations in the normal course of business in the exploitation of the Iron Chief lease and sale agreement, in excess of the amounts allowed to Riverside and Bradt in the California action."

Judge Herlands also found (A. 239):

> ". . . though the record is replete with references to creditors and indebtedness, it appears that much of this is due to debts incurred by Bradt for his personal expenses."

Indeed, the amount of the debts and other obligations *in fact incurred* by Riverside and Bradt in the exploitation of the Iron Chief lease and sale agreement, *was* an *issue litigated* between West and Long and Riverside and Bradt, in the California action (A. 32-33, fnd. 58). Judge Herlands specifically found that one of "The two major issues raised in the West-Long phase of the California litigation" was

"(2) the validity of the expenses listed in Bradt and Riverside's Exhibit B-98" (A. 208).

That issue was specifically adjudicated and determined by the judgment of the California court, and a specific sum of money was awarded and allowed to Riverside and Bradt to cover all such obligations incurred in connection with the Iron Chief mine. Thus, Judge Herlands expressly found (A. 92-93, fnd. 119):

> "119. In its judgment, the California court made an allowance of a total of $7,500 and $13,500, mentioned in the March 14, 1941 agreement (Def's Exh. A-1, pp. 161-166, at pp. 163, 164), plus an additional amount of $20,388.03, or *a total of $41,388.03 to Riverside and Bradt on account of expenses or obligations incurred in connection with or on behalf of the Iron Chief lease and sale agreement* (Def's Exh. A-2, pp. 479-480). There is no competent evidence that any additional expenses, obligations or debts were incurred by Riverside on account of or in connection with the Iron Chief lease and sale agreement". (emphasis added)

The determination by the California court that, subsequent to March 14, 1941, a total of only $20,388.03 expenses, obligations or debts, was incurred by Riverside and Bradt in connection with or on behalf of the Iron Chief lease is, as between West and Long, and Riverside (and, of course, its trustee in bankruptcy, the present appellant), a binding adjudication of *that issue* concerning the amount of the debts Riverside incurred in exploiting the Iron Chief mine. Such adjudication constitutes an estoppel by judgment *on that issue* against the petitioner. (*Cromwell v. County*

of Sac, 94 U. S. 351, 352-3 (1876); *Partmar Corp.* v. *Paramount Pictures Theatres Corp.*, 347 U. S. 89, 91 (1954); *Commissioner* v. *Sunnen*, 333 U. S. 591, at pp. 597-598 (1948); *Saper* v. *Long*, 121 F. S. 65 (S. D. N. Y. 1954)).

It is clear that this estoppel by judgment against the bankrupt runs also against its trustee. (*Heiser* v. *Woodruff*, 327 U. S. 726, 732-733 (1946); *In re Mercury Engineering, Inc.*, 68 F. S. 376, 380 (S. D. Calif. 1946); *Pearson* v. *Rapstine*, 203 F. 2d 313 (5 Cir., 1953); *Davis* v. *Mabee*, 32 F. 2d 502 (CCA 6th, 1929); *Johnson* v. *Burke Manor Bldg. Corp.*, 48 F. 2d 1031 (CCA 7th, 1931); *Detroit Trust Co.* v. *Schantz*, 14 F. 2d 225, 226 (E. D. Mich. 1926), rehearing den'd 16 F. 2d 943).

And Judge Herlands so found (A. 105, Concl. (x)).

Consequently, *at the very outset*, petitioner's principal issue and contention is clearly barred by the estoppel of the California judgment, namely: his contention that Riverside had outstanding large unsatisfied claims of *bona fide* general creditors, which Riverside incurred in the exploitation of the Iron Chief mine and which should be satisfied out of the alleged "profits" from the sale of the mine, but that such profits, instead, were distributed to the defendants-respondents in disregard of the rights and claims of general creditors.

The California judgment finally determined the amount of the debts Riverside had incurred in connection with the Iron Chief mine, and made an allowance to Riverside therefor. Petitioner is precluded, therefore, by that judgment from attempting to claim or

prove that Riverside had other creditors at that time, even if that were true, which it is not.

This destroys the very cornerstone of petitioner's entire case. Because, absent general creditors of Riverside with claims exceeding the amount awarded to Riverside by the California judgment, there is no basis upon which its bankruptcy trustee could claim that the amounts paid to West and Long were voidable preferences or fraudulent transfers, subject to being set aside under the Bankruptcy Act.

POINT II

Moreover, petitioner ignores the fact that each of his separate claims was dismissed by the Trial Judge because petitioner failed, as a matter of fact, to establish each of them on several separate grounds.

Consequently, even if the Trial Judge were mistaken as to one ground, each of petitioner's claims nevertheless must fail on the other separate grounds.

In his opinion the Trial Judge clearly summarized each "cause of action" pleaded in the complaint, and clearly and specifically stated his reasons for dismissing each of them: First Cause of Action (A. 38, A. 102-103); Second Cause of Action (A. 38, A. 102-103); Third and Fourth Causes of Action, (A. 101, Concl. 12); Fifth Cause of Action (A. 38, A. 103-104); Sixth Cause of Action (A. 39, A. 104); and Seventh Cause of Action (A. 39, A. 104-106).

The Court of Appeals in its opinion (Pet. Appdx. A, pp. 29-40) concurred with the determination of the

District Court "so admirably presented in the lengthy opinion below, . . .".

In each case, each separate cause of action was found not to have been established because of petitioner's failure to establish not one, but several separate facts, each of which was essential to the establishment of the particular cause of action upon which petitioner relied.

POINT III

Petitioner's argument with respect to the meaning of the word "transfer" as used in § 67(d)(2) of the Bankruptcy Act is unsound.

Petitioner argues (pp. 9-14) that there is no distinction between the words "transfer made . . . by a debtor" in §67(d)(2) of the Bankruptcy Act, and the words "transfer made or suffered . . . by a debtor" used in §70(e) of the Act.

In footnote 101 to his opinion (A. 211-227), Judge Herlands points out that §60 and §70(e) of the Act, which refer to the avoidance of preferences or transfers "made or suffered" by a bankrupt, include both voluntary and involuntary transfers of whatever kind.

In the same footnote, with a careful analysis of the pertinent authorities, Judge Herlands further concluded that a "transfer made . . . by a debtor" referred to in §67(d)(2) of the Act, was confined to "voluntary" transfers of the bankrupt's property.

He concluded, therefore, that petitioner's First Cause of Action, which is predicated on §67(d)(2) could not avoid the "involuntary transfer" suffered by Riverside under the judgment of the California court, which was entered over Riverside's vigorous opposition.

The Court of Appeals, in its opinion, refers to that conclusion of Judge Herlands, but points out, further, that the alleged transfers were "perfected" more than one year prior to the filing of petitioner's petition in bankruptcy (Pet. Appdx. A, pp. 37-38), and would not fall within §67(d)(2) of the Act, in any event.

This decision by the Court of Appeals, Second Circuit, conflicts in no way with the decisions made in *Eisenrod* v. *Utly*, 211 F. 2d 678 (9 Cir., 1954) and *Warner* v. *Dworsky*, 194 F. 2d 277 (8 Cir., 1952), upon which petitioner relies (pp. 13-14). Both of the latter decisions deal with entirely different factual situations, and, moreover, with §70(e) of the Bankruptcy Act, not with §67(d)(2).

Judge Herlands correctly construed the words "transfer made . . . by a debtor" in §67(d)(2) of the Act, we submit. And, his carefully reasoned conclusions are to be preferred to the off-hand statements made by the textbook writers quoted by petitioner (pp. 10-12). The statements quoted by petitioner, in some cases, do not even support what petitioner claims. Moreover, none of them is supported by any stated reason or buttressed by the citation of any authority.

POINT IV

The alleged transfers or preferences became "perfected" on August 2, 1948, nearly two years and six months prior to March 14, 1951, when Bradt filed in New York a voluntary petition in bankruptcy for Riverside.

Petitioner argued below and asserts again here (pp. 18-22), that the alleged "transfers" or "preferences" allegedly received by West and Long under the California judgment, were "perfected", within the meaning of §60 and §67(d) of the Bankruptcy Act, not on August 2, 1948, when Foley paid the funds to the Clerk of the court as directed by the California judgment, but only on November 21, 1950, when the Clerk paid over the funds to West and Long, after that judgment had been affirmed on appeal, in California.

Petitioner argues (pp. 19-20) that the date chosen by him is correct, because under California law an action is deemed "pending" until any appeals are decided. But as Judge Hemmands pointed out in footnotes 102 and 103 to his opinion (A. 227-234), the fact that the judgment did not become "final" under California law, pending appeal, does not fix the time when the alleged "preference" or "transfer" directed by the California judgment became "perfected". Under the Bankruptcy Act, a "preference" or "transfer", respectively, is "perfected" when:

> ". . . no subsequent lien upon such property obtainable by legal or equitable proceedings on a

simple contract could become superior to the rights of the transferee" (§60(a)(2) of the Act).

or when:

". . . no bona fide purchaser from the debtor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein. . . ." (§67(d)(5) of the Act).

In footnotes 102, 103 and 114 to his Opinion (A. 227-234; A. 247-249), Judge Herlands effectively answers Appellant's patently unsound arguments and contentions, designed to establish that the alleged "preference" or "transfer" was not "perfected" until November 21, 1950. We respectfully refer this Court to those footnotes and to *Funk* v. *First National City Bank*, 185 Okl. 604, 95 P. 2d 589 (1939); and *In re Koslowski*, 153 F. 823 (M. D. Pa. 1907), which offer further support to Judge Herlands' conclusion.

The Court of Appeals in its opinion unqualifiedly agreed with Judge Herlands' conclusion on this point (Pet. Appdx. A, p. 36) and, indeed, we find it difficult to conceive how any contrary conclusion could be reached, within reason.

POINT V

The courts below properly concluded that petitioner had not established Riverside's insolvency against respondents at the material date, August 2, 1948.

Petitioner argues that the bankrupt's schedules in bankruptcy (prepared by Bradt), the proofs of debt, filed by various alleged creditors [none of which had been allowed by the petitioner], eight judgment rolls, and the certified copy of another judgment, establish, as against these respondents, that Riverside was insolvent.

Petitioner confuses his contentions on this point, since he claims that the documents referred to establish Riverside's insolvency *as of November 20, 1950.* However, the courts below have held, and we submit, correctly, that the material date for establishing Riverside's insolvency is *August 2, 1948* (See Point IV; *supra*, pp. 12-13).

Petitioner makes no effort to analyze for the benefit of this Court, what he contends these documents show with respect to Riverside's insolvency *on August 2, 1948.* Fortunately, the Court of Appeals, in Exhibit B to its Opinion (Pet. Appdx. A, pp. 42-43) did take the trouble to make such analysis, which clearly establishes that Riverside was not insolvent on the material date, August 2, 1948.

Even if all of the above were disregarded, we submit, further, that the alleged *prima facie* proof of insolvency upon which petitioner seeks to rely, is wholly worthless and incompetent, for several reasons.

The schedules annexed to Riverside's bankruptcy petition were objected to as proof of insolvency. Moreover, they were inherently incredible, having been prepared by Bradt on the basis of his Exhibit 98-B in the California action, which exhibit was discredited and rejected both by the California court and by the District Court upon the present trial (A. 92, fn. 118; A. 238; A. 238, fn. 70; A. 257, fn. 120).

As to Bradt's credibility, the California court (Honorable William J. Palmer) had this to say, and the District Court in New York agreed with his conclusion (A. 178, 179):

> "He [Bradt] came back here with what, without any exception, was the most preposterous effort to establish properly chargeable expenses that I have ever seen in court . . . He comes back here with an obvious effort to charge against this fund every dollar he could possibly think of as having been incurred by himself for personal expenses and every kind through the years . . . it just made this total account . . . utterly unworthy of credence . . .
>
> * * * *
>
> . . . the whole effort to commit this imposition upon the Court, an effort which was a little short of an insult to this Court's intelligence, was such that it just left the whole document without foundation and unworthy of credence."

And, further:

> "I have been too kind to Mr. Bradt in restraining comments that I might have made concerning his testimony. . . . But I will say now

> to his present counsel who may or may not repeat it to his client, as his judgment dictates, that in all my experience in the law I can only now think of two or possibly three other persons whom I have ever confronted on the witness stand who were, in my judgment and appraisal, as slippery and unreliable as Mr. Bradt. (Defendants' Exh. B-16, p. 107)."

It is established that a hearsay declaration cannot be accepted as evidence unless "made under circumstances regarded as rendering it trustworthy", *Matter of Knetzer, Bankrupt*, 243 F. 2d 460 (7 Cir., 1957) and it is properly excluded, as the Court of Appeals held in that case, where (p. 462):

> "The trial court could not have listened to all of the evidence in this case without realizing that statements made by Knetzer, sworn or unsworn, could not be relied upon."

The six cases cited by petitioner (p. 16) were all relied upon in the courts below. None of these holds that, as against third parties, insolvency can be established by the bankrupt's schedules alone. In all of them there was ample competent proof to establish the insolvency, aside from the schedules, which appear to have been received without objection and are referred to in the opinions only by passing comment.

As to the "proofs of claim" filed in Riverside's bankruptcy proceeding, they were objected to, when offered (A. 705), and were received by the Court, not

as proof of insolvency, but for a very limited purpose (A. 708):

> "The Court: For the limited purpose . . ., simply as proof of the fact that certain claims have been filed; is that correct?
>
> Mr. Ross: That is right.
>
> The Court: And nothing else.
>
> Mr. Ross: No. . . ."

Petitioner admitted that the claims filed had not been allowed (A. 707), and Judge Herlands correctly held them incompetent to establish Riverside's insolvency (A. 240; A. 90-91, fnds. 110-111).

As to the judgments against Riverside, all but two of which were by default, they do not establish Riverside's insolvency on August 2, 1948 (Findings 121-132, A. 93-97; fn. 104, A. 234-241, particularly at 241). Petitioner's reference (p. 17) to the Full Faith and Credit Clause in connection with these judgments, is without merit (*Riley* v. *New York Trust Co.*, 315 U. S. 343, (1942); *Gratiot State Bank* v. *Johnson*, 249 U. S. 246 (1919), as the Court of Appeals properly held (Pet. Appdx. A, p. 37).

POINT VI

Answering petitioner's Point IV

Petitioner presents a confused argument (pp. 23-27) to the general effect that the entrepreneurs, risk-takers, or promoters of a corporate venture, cannot acquire rights in the funds of the corporation "superior to general creditors":

While the general principle and the authorities cited by petitioner are sound, they have no application here, in view of the detailed findings of the Trial Court. For the existence of general creditors of Riverside was not proved (Point V, *supra*, pp. 14-17), and, indeed, could not have been proved (Point I, *supra*, pp. 5-9).

Moreover, as the Court of Appeals points out (Pet. Appdx. A, pp. 32-33), Riverside never had any right under the March 14, 1941 Agreement to the sums awarded respondents, West and Long, by the California judgment.

POINT VII

The petition for a writ of certiorari should be denied.

Dated: New York, N. Y.
June 9, 1959

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